United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1206. 157

PINKIE M. DABNEY, APPELLANT,

vs.

JOHN N. DABNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 15, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1902.

No. 1206.

PINKIE M. DABNEY, APPELLANT,

vs.

JOHN N. DABNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Bill	1	1
Demurrer	4	3
Decree sustaining demurrer	5	3
Opinion of court	6	4
Appeal and amount of deposit in lieu of appeal bond fixed	30	15
Memorandum: $25.00 deposited in lieu of appeal bond	30	16
Clerk's certificate	31	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 16, 1902.

In the Court of Appeals of the District of Columbia.

PINKIE M. DABNEY, Appellant,
vs.
JOHN N. DABNEY. } No. 1206.

a Supreme Court of the District of Columbia.

PINKIE M. DABNEY, Complainant,
vs.
JOHN N. DABNEY, Defendant. } No. 22939. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed December 24th, 1901.

In the Supreme Court of the District of Columbia.

PINKIE M. DABNEY, Complainant,
vs.
JOHN N. DABNEY, Defendant. } In Equity. No. 22939.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainant, Pinkie M. Dabney, respectfully shows as follows:

1. That both she and the defendant, John N. Dabney, are citizens of the United States and have been residents of the District of Columbia for more than three years next preceding the filing of this bill.

2. That the complainant and defendant were lawfully married on the 14th day of July, A. D. 1897, in the city of Lynchburg, in the State of Virginia, by the Reverend Burnard Tyrell, pastor of the Diamond Hill Baptist Church of the city aforesaid.

3. That there was born to the complainant and defendant one child, which subsequently died, and that the complainant and defendant have no child living.

4. That the complainant and defendant lived together as husband

and wife until about the 15th day of August, A. D. 1899, at or about which time the defendant willfully, voluntarily, and without
2 any reasonable or just cause therefor, deserted and abandoned the complainant and refused to live and cohabit with her longer, and that for more than the space of two years and up to the commencement of this action the defendant has continuously and uninterruptedly absented himself from the complainant and has contributed nothing whatever to her support; that the defendant has refused to return and live with the complainant and still refuses so to do without any fault on the part of the complainant, and that said act of desertion became completed at or about the date aforesaid and while the complainant and defendant were residents of the District of Columbia.

5. The complainant further charges that the defendant willfully, voluntarily, and without just cause deserted and abandoned the complainant, and that such desertion and abandonment have continued for a period of more than two years prior to the bringing of this suit.

Wherefore the complainant prays:

1. That the said John N. Dabney be made a party defendant hereto, served with process, and required to answer the exigency of this bill.

2. That the complainant may by the decree of this honorable court be divorced absolutely from the bond of matrimony with the defendant, John N. Dabney.

3. That by the decree of this honorable court the complainant may be restored to her maiden name of Pinkie Mazrine Johnson.

4. That the complainant may have such other and further
3 relief as the circumstances of this case require and to the court may seem right and proper.

PINKIE M. DABNEY.

ALEXANDER G. BENTLEY,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, Pinkie M. Dabney, do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, and that the matters therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

PINKIE M. DABNEY.

Subscribed and sworn to before me this 24th day of December, A. D. 1901.

J. R. YOUNG, *Clerk*,
By FRED C. O'CONNELL,
Ass't Clerk.

4 *Demurrer.*

Filed March 14, 1902.

In the Supreme Court of the District of Columbia.

PINKIE M. DABNEY, Complainant,
vs.
JOHN N. DABNEY, Defendant. } In Equity. No. 22939.

Now comes John N. Dabney, the defendant herein, and files this his demurrer, and says that the court has no jurisdiction in the above-entitled cause.

JOHN N. DABNEY, *Defendant.*

I do solemnly swear that the demurrer herein is not interposed for delay.

JOHN N. DABNEY, *Defendant.*

Subscribed and sworn to before me, at Washington, D. C., this 14th day of March, 1902.

[SEAL.]

S. A. SEBRING,
Notary Public, D. C.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

T. L. JEFFORDS,
FRANK P. CLOSS,
Attorneys for Defendant.

5 *Decree.*

Filed April 11, 1902.

In the Supreme Court of the District of Columbia.

PINKIE M. DABNEY, Complainant,
vs.
JOHN N. DABNEY, Defendant. } In Equity. No. 22939.

This cause came on to be heard on defendant's demurrer to the complainant's bill of complaint. The same having been argued by counsel and considered by the court, it is by the court this 11th day of April, A. D. 1902, ordered, adjudged, and decreed that the said demurrer be, and the same hereby is, sustained.

It is further adjudged, ordered, and decreed that the complainant's bill be, and the same is hereby, dismissed.

A. B. HAGNER,
Asso. Justice.

6 *Opinion.*

Filed April 11, 1902.

In the Supreme Court of the District of Columbia.

PINKIE M. DABNEY
vs.
JOHN N. DABNEY. } In Eq. No. 22939, Docket 51.

A large number of applications for divorce have recently been presented to the court, which were instituted before the first of January, 1902. In some of them the testimony has been fully taken; in others only partially, or not at all. Some of these applications were for divorce from the bond of marriage upon the ground of adultery, either alone or in connection with charges of drunkenness, cruelty, or desertion; and other- were upon some or all of the latter charges, omitting that of adultery. Still others were applications for independent alimony without a prayer for divorce.

All of the causes in which adultery was charged have been regularly acted on, since, as the code recognizes a divorce for adultery, there is plainly in existence a law under which such a decree could be rendered. In the same manner the court has assumed jurisdiction of the application for independent alimony, since the jurisdiction of chancery to grant such relief is independent of statute, and the section of the code on that subject only contains directory provisions in connection with its administration. But in others of the causes commenced before January, 1902, which do not claim a divorce for adultery, but rely only upon the charges of drunk-

7 enness, cruelty, or desertion, action was suspended, as I desired to hear argument before deciding whether the court was authorized to take jurisdiction of them in the present state of the law.

The existence of well-founded doubts on the question of jurisdiction demanded a careful examination; for as the parties to divorce suits frequently marry after a divorce, an erroneous assumption of jurisdiction in such a contingency might involve the risk of bastardizing innocent issue. It was also thought best to wait and see whether Congress might, by amendment of the code, remove whatever difficulties might be shown to exist in the present state of the law.

A demurrer to the relief claimed was interposed, and careful arguments have recently been presented by counsel in the case of Dabney *vs.* Dabney, which is one of this class of cases, and I shall now express my opinion with respect to all of them in considering the code at bar.

The entire jurisdiction in divorce causes within the District of Columbia was the creature of the statute of the 19th of June, 1860 (R. S. D. C., sections 771 *et seq.*), and its explicit repeal, unaccom-

panied by any saving clause as to pending causes, would of course deprive the courts of all power to deal with such cases from the moment of its repeal, since no proceeding can be carried on under a law that has ceased to exist, and which therefore can confer no authority upon a court to declare a judgment. Particularly does this principle apply to the repeal of statutes giving a special remedy, since it is well settled that in the absence of a saving clause in favor of pending suits "all such suits must stop where the repeal finds them. If full relief has not been granted before
8 the repeal went into effect it cannot be after" (101 U. S., 438, South Carolina *vs.* Gaillard; Bishop on Statutory Law, sections 175–'77).

Many adjudged cases illustrate the great strictness with which the courts have applied this principle. In Yeaton *vs.* The United States, 5 Cranch, 282, where an appeal was taken from a sentence of condemnation in admiralty of a vessel for violation of an embargo law, but before the case came on for hearing the law had expired, the Supreme Court held that, as a sentence of condemnation could not then be pronounced under a law no longer in force (in the absence of a statutory provision preserving the forfeiture), the libel should be dismissed.

In "The Irresistible," 7 Wheaton, 551, a vessel was condemned for a violation of the act of 1817 *which* the act was in force. Congress at the next session repealed the act, with an explicit proviso that persons offending might be convicted and punished under the repealed act as if it were not repealed, and that no forfeiture incurred under a sentence of condemnation should be affected by the repeal. But the Supreme Court held that notwithstanding this provision no punishment could be inflicted after the expiration of the act of 1817 in the absence of a particular provision in the act for that purpose.

In another cause arising under the embargo law, where a condemnation had been made and the money received by the captors, the Supreme Court, when the appeal came up for hearing after the law had expired, held the case should be examined *de novo*, and as there was no law in existence to support the judgment, the
9 condemnation should be set aside and the money refunded to the owners of the vessel.

Congress intentionally omitted from the code the entire law of divorce embodied in the act of June, 1860 (Rev. Stats., 771 & *seq.*), which was a statute applicable only to the District of Columbia. Section 1638 of the Code, which describes all the classes of laws that are *to be repealed*, includes "all acts and parts of acts of Congress applying solely to the District of Columbia in force in the District on the day of the passage of this act," and on the other hand, in the enumeration of the classes of laws designed *to remain in force* in section 1 of chapter 1, no mention is made of "acts of Congress applicable solely to the District of Columbia."

The effect of the words of inclusion and exclusion in these two provisions must undoubtedly be to remove absolutely all former divorce provisions of the Revised Statutes from the body of the exist-

ing law of the District. If, therefore, any portion of that former law remains in force it must be by virtue of some other express provision of the code.

Whatever legislation was designed to be substituted within the District for the former statute as to divorces is embraced in chapter 22 of the Code, entitled "Divorce," and to that we must look to ascertain whether this court can at this time entertain an application for a divorce from the bond of marriage for any other cause than adultery, where the application was made before the code went into effect.

Upon every principle applicable to the construction of statutes, whatever is included in the substituted legislation must be construed as prospective only in its operation, and in no degree
10 retrospective in the absence of express declarations to that effect.

Section 966 declares:

"A divorce from the bond of marriage may be granted only where one of the parties has committed adultery during the marriage," and there is not a word in the entire chapter at variance with this positive declaration. Its language throughout is confirmatory of that declaration.

Section 966 also contains the provision that "legal separation from *bed and board* may be granted for drunkenness, cruelty, or desertion." But this language repels the idea that the court shall have the power to grant a divorce from *the bond of marriage* for either of those causes, and the claim that any such power is conferred upon the court is further repelled with equal clearness by the language of section 969, which shows that it is "in cases *where a divorce from the bond of marriage is prayed*" (which can only be where adultery is charged) "the court shall have authority to decree a divorce from bed and board" (which can only be granted for drunkenness, cruelty, or desertion) "if the cause proved be sufficient to entitle the party to such relief only."

It is contended that as the law under the Revised Statutes which gave the court power to grant a divorce from the bond of marriage for drunkenness, cruelty, or desertion was in force when these bills were filed, and as those three causes are now recognized in the code as being causes for legal separation, this court may now make such a decree as it had been empowered under the Revised Statutes to make for these causes, namely, from the bond of marriage; but the three offenses therein recognized in the Revised Statutes as
11 cause for a decree *a vinculo*, although bearing the same general names, were widely different from the offenses called by the same names in the code. The Congress that enacted our Revised Statutes showed its evident unwillingness to authorize a divorce for *drunkenness*, unless it was proved to be habitual and that it had existed for three years," or for *cruelty*, unless it "endangered life or health," or for *desertion*, unless the wilful desertion and abandonment had continued for the full, uninterrupted space of three years." These offenses thus clearly defined are very different from the un-

explained kind of "drunkenness" named in the code, which may be only occasional and intermittent and may continue not more than one year or less; from the "cruelty," which may be limited to what the courts denominate as an occasional ebullition of temper, or which may be confined to disrespectful language, which is sometimes denounced as mental cruelty, or from the "desertion," which may have continued only for a few weeks and may not have been continuous or evincive of an intention to abandon the marriage relation, and yet, under the unrestricted terms of section 696, the court might be called on to decree the "legal separation" on proof of either of these conditions.

In the case of Grant *vs.* Grant (12 S. C., 29) this distinction was observed. The constitution of the State contained a provision that "the court of common pleas shall have exclusive jurisdiction in all cases of divorce." In 1872 a statute was passed allowing divorces on the ground of adultery. In 1878 the complainant filed a petition for a divorce because of adultery. Shortly afterwards, in the same year, this act was repealed, and after the repeal the cause was submitted for a decree, but the judge dismissed it,
12 upon the ground that the court should not hear testimony or render judgment under a repealed statute. It appears sufficiently from the opinion of the appellate court, it was contended on behalf of the complainant, that, as his petition was filed while the act authorizing a divorce for adultery was still in force and while the constitutional provision authorizing divorces continued in existence, the court below should have proceeded with the case, notwithstanding the repeal of the act. The facts there were less embarrassed than those in the case at bar, since the offence there charged—adultery—requires no definition to explain its meaning, and is, moreover, universally acknowledged as a cause for divorce wherever that right is recognized; but the appellate court held that, notwithstanding the continued existence of the constitutional recognition of the judicial power to grant divorces, the repeal of the act referred to left the court without any sufficient authority to consider the petition, and that "the mere grant of judicial power in the Constitution did not remove from the legislature authority to determine to what class of cases such judicial power should extend. No remedy is complete without a definition of the cases to which it shall extend, and the Constitution is wholly silent on this subject." There was no saving clause in the repealing act, but the court does not advert to that point. It seems against natural justice that a person against whom an infraction of law is alleged should have had no opportunity of knowing in advance the extent of transgression for which he may be held liable; it would be as unjust
13 as the ancient device of fastening the edicts so high up on the walls that persons would be unable to read them.

See also 13 Allen, 581, Com'r *v.* McDonough, which was decided on similar grounds.

The contention, therefore, that the decree *a vinculo* should be given on a bill filed before the code went into effect, because the same of-

fences are punishable under the code, is not supported by the facts, for, as we have seen, the two classes of offences are quite different.

The expression "legal separation" was unknown to our law before it found its place in the code, and in the absence of some definition in the statute is of very uncertain significance, for separation by decree *a mensa et thoro*, or voluntary separation by the parties upon written agreement executed in legal form, equally may as well be comprehended by the phrase "legal separation," as if it were the result of a divorce *a vinculo matrimonii*.

There is no method by which a divorce from the bond of marriage can now be granted by this court for either of the three causes referred to, in the face of the positive declaration that such a divorce shall be granted only for adultery, except by holding that the code contains an efficient saving clause keeping in force the provisions of the former divorce law. It is contended that such a saving clause is to be found in section 1638, by force of which a decree for divorce may be rendered according to the then existing provisions of the Revised Statutes on any petition which was filed before the 1st of January, 1902, although no charge of adultery is contained in it.

The words of that section are as follows:

14 "The repeal by the preceding section of any statute, in whole or in part, shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before such repeal, but all rights and liabilities under the statutes or parts thereof so repealed shall continue and may be enforced in the same manner as if such repeal had not been made: *Provided*, That the provisions of this code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings, civil or criminal."

The first part of this section specifies in three subdivisions the classes of things which shall not be affected by the repeal, while the latter part in corresponding subdivisions states what shall be the result of these several exemptions from repeal of the matters previously declared to be exempt from its influence. Examining the section critically, it is difficult to see how the statement in the first subdivision that the repeal provision shall not affect "any act done," or that "any rights accruing or accrued" in the second part of the section, in connection with the corresponding words in the latter part of the section as to the effect of such exemption as to "rights and liabilities," could be taken as meaning that the filing of a petition before the repeal provision, asking for a divorce from the bond of marriage because of desertion, can authorize this court now to grant the prayer in the face of the positive denial of such power in the provisions of the code.

The only words in the section that can be taken to refer at all to the preservation of pending suits are those in the third
15 subdivision of the matters not to be affected by the repeal, namely, "any suit or proceeding had or commenced," and in the corresponding provision at the end of the section as to the result of such exemption, in these words: "*Provided*, That the provisions

of this code relating to procedure or practice, and not affecting the substantial rights of parties, shall apply to pending suits or proceedings, civil or criminal."

All these provisions are in the nature of *provisos* to the general repealing clause No. 1636, and should be construed with strictness according to the following declaration of the Supreme Court in United States *vs.* Dickson, 15 Peters, 165:

"Passing from these considerations, * * * we are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

It is also laid down (Sutherland on Statutory Construction, section 225), that the courts equally apply rules of strict construction to *saving clauses* in statute.

It has been argued for the defendant in this case, in opposition to the decree, that the provision "any suit or proceeding had or commenced in any *civil cause*" can have no application to a divorce proceeding, because a divorce case is not a civil cause within the meaning of the statute, and our District decisions were referred to to support this contention. Section 876 of the evidence act in the Revised Statutes declares that "on the trial of any issue joined or of any matter or question, or any inquiry arising in any suit, action or other proceeding in any court of justice of the District * * * the parties thereto * * * shall be competent and compellable to give evidence."

It has been contended that under this section the husband and wife could be examined as witnesses in a divorce proceeding, but in Burdette *vs.* Burdette, 2 Mackey, 470, the general term decided that divorce cases were not embraced within either of the various controversies enumerated in the section quoted, and that husband and wife could not be examined therein as witnesses. Afterwards, in Capital Traction Co. *vs.* Lusby (12 App., 381) the Court of Appeals held the wife was a competent witness in an action brought by the husband and wife to recover for injuries sustained by the wife in a railroad accident. Subsequently, in the divorce case of Bergheimer *vs.* Bergheimer (17 App., 381), it was insisted the ruling in Burdette *vs.* Burdette had been overruled in the Lusby case, and that the parties in the pending divorce case were competent witnesses, but the Court of Appeals pointed out that its decision in the Lusby case was not rendered in a divorce case, but in a civil suit, in which, as a general thing, husband and wife could testify, and that the law was different in a divorce case, which was not an ordinary suit at law, but a special proceeding "in a matter *sui generis*, standing apart and alone, not affected and not in-

16

17

tended to be affected by general statutes applicable to ordinary cases," and that "a proceeding for divorce is not an action by or against a husband or wife. It is a special statutory action by one against the other, and our decision in Lusby *vs.* The Capital Traction Company is neither by its letter or by its spirit applicable to it."

The proceedings in petitions for divorce differ in many particulars from those in ordinary civil causes. In divorce cases no admissions in the pleadings by the parties are admissible or can be made the ground of a decree. Husband and wife are incompetent as witnesses. The proceedings are not within the statute of limitations, which will not be extended by interpretation to embrace them. The husband, though successful in the suit, ordinarily is obliged to pay the entire costs, and to maintain his opponent during the litigation, and frequently after he has gained the case he is decreed to continue the support of the former wife and to maintain the children, who are not parties to the suit, as well as to pay the adverse solicitor. The methods of enforcing the collection of these charges differ from those that obtain in civil suits. The decrees may change the names of the female parties, and direct the guardianship and custody of the children. In opposition to the practice in all civil cases, no person not a resident of the District of Columbia can maintain a suit here for divorce or nullity of marriage, nor can a resident recover in respect of any cause that has occurred outside of the District unless he has been a *bona fide* resident there for at least three years before the filing of the petition.

18 There is another important consideration that differentiates divorce proceedings from all civil causes. A judgment or decree by the court of last resort in such causes is a finality, and is said to import absolute verity and is not capable of being disturbed by the court itself after the term except for grave causes. But the final decrees in divorce cases in many respects are malleable and capable of alteration by the court after long intervals within recognized limits to meet the ends of justice and the varying circumstances of the parties. The allowance for alimony, for instance, may be increased or diminished or altogether abolished and again renewed, in the discretion of the court. The custody and guardianship of the children and the allowance ordered for their support may be changed from time to time, and for cause shown, after proof of subsequent misconduct and after sentence of divorce from bed and board, the female defendant may be absolutely deprived of all further claim for alimony and her right to dower may be rescinded. The explanation of these differences in such important respects grows out of the fact that the real question at issue in divorce cases is not merely a personal one between the parties, but is rather a triangular controversy as to the future social condition of two *of* citizens in which the public is so greatly concerned that the District attorney, by the terms of the code and according to the practice in several of the States, is obliged to intervene "to prevent collusion and protect public morals," in the words of the code.

These are some of the peculiarities in the conduct and results of the action for divorce that abundantly justify its designation
19 as a proceeding *sui generis*, with far more reason that various other special proceedings may be so termed. Such is the case reported in 21 Vermont, 23, Sweet *vs.* Turnbull, which was an application in a bastardy case to procure an order of filiation upon the petitioner's father, which was held by the court not to be a civil cause. So in 90th Pennsylvania, 498, Williamsport *vs.* Steele, a petition for a mandamus was held not to be a civil cause and was said by the court to resemble rather such a proceeding as *quo warranto*.

Proceedings for contempt, for certiorari, mechanics' liens, street extension cases, election contests, and questions arising as to the constitution of juries, and disputes arising in the Patent Office, Land Office, Pension Office, &c., would seem to stand on the same footing.

In contradistinction from criminal cases, these proceedings may be called civil; as, on the other hand, a requisition of a fugitive from justice may be loosely spoken of as a criminal cause, though it is not *a cause* at all in the proper sense of the term. In 36th Alabama, 262, Withers *vs.* The State, it was held that cases before the mayor of a town for violation of municipal ordinances are not civil causes within the meaning of the bill of rights of that State. In 104th Indiana, Powell *vs.* Powell, page 18, it was held that the term "civil cases" did not include special statutory proceedings, and in 18th Michigan, 259, Converse *vs.* Grand Rapids, the court decided that the statute allowing two peremptory challenges in civil cases did not apply to special proceedings not in the ordinary course of law.

20 In 4th Kansas, 484, Gordon *vs.* The State of Kansas, the word "*proceeding*," in the compilation on construction of statutes, which provides that the repeal of a statute does not affect any *proceeding* commenced under or by virtue of the statute repealed, was held to be a technical word, which had acquired a peculiar meaning, and must be construed accordingly, and that "an election for permanently locating a county-seat is not a *proceeding* within the meaning of that act."

In Lucas *vs.* Lucas, 3rd Gray (Mass.), p. 136, it was held that a writ of review did not lie to revise a decree dismissing a libel for divorce. Chief Justice Shaw in his opinion said:

21 "Looking, then, beyond the mere philological sense of the term *civil action* as used in this clause of the Revised Statutes, we find that a process for divorce is, in a certain sense, a judicial proceeding, but that originally this jurisdiction was not vested in the courts of common law; that the trial and proceedings were not according to the course of common law; that, though in a certain sense the object of a libellant is to obtain redress for a grievance or private injury, yet that it is not by way of recovery of damages or obtaining property, real or personal, but rather for the purpose of ascertaining and declaring authoritatively the status or civil and social condition of a party, upon which numerous and most important personal and social rights and duties are made by law dependent."

The note under the head of "Claim," where many of the above cases are referred to in the 6th American & English Encyclopædia of Law (2nd edition), page 97, contains a very full statement of the various decisions on the subject.

The principle that technical words in reference to a technical subject are supposed to be used in a technical sense is illustrated in Emlich on Statutes, section 74, by citations of these authorities, among others:

"Again: Proceedings in insolvency were held not to be an *action* within the meaning of that word in a statute saving from the effect of the passage or repeal of an act actions pending at the time (71 Maine, 403, Belfast *vs.* Folger). Nor does the term *proceedings*, in the provision of a code that 'no action or proceeding commenced' before its adoption shall be affected by it, include a judgment, the
22 latter being an entire act, and incapable in any proper sense of being commenced before a certain day. Nor is an *election* covered by a similar clause as to *proceedings*. Nor is a *petition for partition* an *action* within the meaning of a statute giving costs to the prevailing party in all *actions*."

In 52nd Texas, 335, Williamson *vs.* Lane, a *contested election* was held not to be a *civil case*, "nor a suit, complaint or plea," within the meaning of clauses in the State constitution,

On the other hand, in 20th Indiana, 101, Ellis *vs.* Hatfield, and in 16th Indiana, 129, and several later cases in that State, and in similar cases in other States, it has been held that a statute conferring jurisdiction in all civil cases at law or equity included suits for divorce, thus showing a difference of opinion from time to time in the Indiana courts, as these last cases differ from the decisions in 44th Indiana, Musselman *vs.* Musselman, and from the tenor of 104 Indiana, Powell *vs.* Powell, *supra*, and from Gordon *vs.* Gordon, 42 Indiana, 92, where a proceeding by *habeas corpus* was held not to be a civil action or a civil case within the meaning of the Indiana code, nor within the bill of rights providing for trial by jury. In 9th Indiana, 559, Railroad Co. *vs.* Hencke, in determining the scope of the provision securing trial by jury in all civil cases, the court said it had been determined that chancery cases, contested-election cases, assessments of damages, laying out of highways, &c., were not within the provision. This is quoted with approval in 26th Indiana, 62, Turnpike Co. *vs.* Burket.

But the weight of the authorities and the reason of the matter, in my opinion, are decidedly against the color of class last referred to.
23 Apart from its general language, there is not a word in the repealing section that intimates its application to proceedings in divorce, nor in the twenty sections of chapter 22, "Divorce," where one might reasonably expect to find some mention of pending causes, is there any reference to the subject. It seems most improbable, if Congress had desired the preservation of the petitions undisposed of when the code should take effect, asking for divorce from the bond of marriage on the ground of drunkenness, cruelty, or desertion, that it would have failed to provide for their continuance

in that chapter, especially as it had therein declared in positive words that a divorce from the bond of marriage should *only* be granted on account of adultery. It might have settled the matter in a few sentences that would have effectually relieved all parties from the maze of doubt and difficulty in which they are now struggling.

As is said in Emlich on Statutes, section 201, "It is but a reasonable inference that the legislature cannot be supposed to have intended there should be two distinct enactments embracing the same matter in force at the same time."

Applying this language, it seems impossible to suppose
24 that the legislature could have intended two such contradictory remedies should be allowed to be in force at the same time in our courts for an indefinite period, for there is no limitation to the continuance for years to come of the cases commenced before the code went into effect.

If there were any question as to which of the two forms of decrees it was the chosen purpose of the legislature to prescribe, it would seem capable of being readily solved by considering that the provision prohibiting any divorce from the bond of marriage, except for adultery, is framed in the most positive, terse, and explicit language, so that nothing in the code is more positive, and that on the other hand the contention that the repealed section authorizing divorces from the bond of marriage for desertion, cruelty, or drunkenness certainly is not expressly nor by any strong implication supported by anything said in any part of the code. In such a case the explicit declaration ought to prevail over the inference or deduction from uncertain words, particularly as the explicit utterance is in conformity with the undoubted purpose of Congress, while the inferential or conjectural deduction from uncertain language is plainly at variance with the equally undoubted purpose of the legislature.

It was the law before Coke's time that a saving clause in a statute which is repugnant to or inconsistent with the body of the statute is to be disregarded and rejected as of no effect, being only an exception of a special thing out of the general things mentioned in the statute (Black on Interpretation of Laws, pages 278–'9; Youett *vs.* Simons, L. R., 10th Chancery Division, 518; 1st Coke, 47*a*, Alton Wood's case).

25 The question as to the relative force of the proviso and the saving clause is no longer important, but it is the rule that each shall be construed with strictness, and that the court is to decide, upon consideration of the statute with proviso and the saving clause, which is to prevail in a particular case, with the injunction that in such case the inferior is to yield to the superior.

In determining this question upon the principles indicated I feel no doubt that the alleged saving clause has no power to prolong the existence of the cases commenced before January, 1902, which claim a divorce from the bond of marriage on the ground of drunkenness, cruelty, or desertion.

In my opinion, the principle of the decision of the Court of Appeals in Clark *vs.* U. S., 30 Washington Law Reporter, page 70, sustains this ruling. On December 23, 1901, the clerk, in obedience to the existing law, drew from the jury-box the names of persons qualified under that law to serve as grand jurors and as petit jurors for the several courts of the system. They were duly summoned to appear on the 7th of the next month, at which time the code had become operative, and were sworn as grand and petit jurors respectively. The grand jury, as thus constituted, examined the witnesses on a presentment against William Clark, and returned an indictment against him to the criminal court. When called to answer he filed a plea in abatement, designed to raise the question whether the grand jury thus summoned had jurisdiction of the case. To this a demurrer was filed by the district attorney, which was sustained by the court, and an appeal was taken from that judgment to the Court of Appeals. The Court of Appeals
26 reversed the judgment below, being of opinion that the grand jury had no jurisdiction to present the indictment. The effect of the earlier portions of section 1636, which relate only to proceedings in *civil causes*, could not be directly involved in the inquiry in the Court of Appeals, which was a criminal case; but the latter portion, which declared the provisions of the code relating to procedure or practice and not affecting the substantial rights of parties should apply to "*pending* suits or proceedings, civil or *criminal*," might have been claimed to be involved, since it appeared from the papers in the case that the offense was charged to have been committed in December, and the defendant had been arrested under the old law and held for the grand jury. But that court, when holding there was no efficient saving clause in the section referred to which gave the grand jury appointed under the old system the power to find a bill after the application of the new law, adverted to the difference between the requirements of the old law as to the mode of choosing the grand jury and those prescribed by the code, and especially to the additional qualifications of jurors under the code, which required they should be able to read and write and understand the English language; and circumstances were relied on as indicating the impropriety of requiring the defendant to plead to an indictment found by a grand jury whose qualifications were perhaps insufficient under the law in force when it found the bill.

Declaring it was indeed unfortunate there should be no section of the code continuing in force the provisions of the former laws relating to juries, the courts nevertheless held the situation
27 would not justify them in reading such a provision into one of the saving clauses or into one of the exceptions from the general repeal of former laws, since courts cannot be justified in adding a provision to a statute under the guise of construction. The judgment of the court, therefore, was that as the code had gone into effect on the first of January, 1902, there was no law authorizing the empanelling of the grand jury that found the indictment.

Before the case of Clark had been called for trial the attention of

the judges of the supreme court of this District had been directed to a consideration of the effect of the saving clause, and they agreed that it was highly important that a curing act should be passed in the nature of an efficient saving clause which might validate the jury drawn under the old system. Such a law was prepared and passed both Houses of Congress, but by an unfortunate accident it was not approved by the President by the day appointed for the meeting of the criminal court. The Court of Appeals in the Clark case alluded to this, and another law was prepared and passed and approved, validating the selection and qualification of these juries. Each of these curing statutes was a distinct legislative construction of the insufficiency of the saving clause in the code.

28 My opinion upon the various questions I have been considering is that in cases which have been brought since the code went into operation, claiming only a divorce *a mensa et thoro* for drunkenness and its kindred offences there can be no decree for divorce in the absence of an amendment of the law which shall state distinctly (according to what may be the wish of Congress) whether the courts are to be empowered to decide on those cases at all, and, if so, whether they are to give the divorce according

29 to the provisions of the old law or according to those of the code, and that in the absence of a further amendment in such cases alimony *pendente lite* cannot be granted on bills filed for divorce *a mensa et thoro* since January, 1902, as that relief, under section 975, is claimable only during the pendency of a suit *for divorce from the bond of marriage* or of a suit for nullity of marriage.

With reference to the suits which were commenced before the code came into operation, I am of opinion there can be no divorce with respect to the charge of drunkenness, cruelty, or desertion in the absence of an amendment distinctly stating (if such be the desire of Congress) that they should be tried by the court now and determining whether the relief granted should be according to the old law or according to the new, and with such a clear description of the character of the drunkenness, desertion, and cruelty spoken of and of the duration of those offenses relied on as entitling the complainant to relief.

A. B. HAGNER.

11 April, 1902.

30 *Decree Allowing Appeal.*

Filed April 11, 1902.

In the Supreme Court of the District of Columbia.

PINKIE M. DABNEY, Complainant,
vs.
JOHN N. DABNEY, Defendant. } In Equity. No. 22939.

An appeal having been noted in open court by the complainant to the decree passed herein on even date herewith, the same is hereby allowed, and the appellee having signified his concurrence in open

court, the appellant is hereby relieved from giving the usual appeal bond.

It is further ordered, adjudged, and decreed that the complainant be required to make a deposit of $25.00 in lieu of said appeal bond.

A. B. HAGNER,
Asso. Justice.

11 April, 1902.

Memorandum.

April 12, 1902,—$25.00 deposited in lieu of appeal bond.

31 UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30 inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 2939, equity, wherein Pinkie M. Dabney is complainant and John N. Dabney is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of April, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1206. Pinkie M. Dabney, appellant, *vs.* John N. Dabney. Court of Appeals, District of Columbia. Filed Apr. 15, 1902. Robert Willett, clerk.